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Supreme Court, U.S.
FILED

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NO. _____

In The
Supreme Court of the United States

HENRY LEE DENNIS,
Petitioner,

vs.

STATE OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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34 pp

OPINION BELOW

The Order of the United States District Court for the Western District of Oklahoma adopting the Report and Recommendation of the United States Magistrate Judge filed June 8, 2000 is reprinted in the Supplemental Appendix ("Supp. App.") beginning at Supp. App. 1.

The Report and Recommendation of the United States Magistrate Judge filed June 7, 2000 is reprinted beginning at Supp. Äpp. 3.

SUPPLEMENTAL APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE
WESTERN DISTRICT OF OKLAHOMA

FILED
JUN 081999
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U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY s/bDeputy

HENRY LEE DENNIS, Petitioner,	)	
v.	)	No. CIV-98-335-A
DAYTON POPPEL, et al., Respondents.	)	

DOCKETED

ORDER

This matter is before the Court for review of the Report and Recommendation of United States Magistrate Judge Valerie K. Couch issued June 7, 1999 pursuant to 28 U.S.C. § 636(b)(l)(B)-(C). Judge Couch recommends denial of the petition for reasons of procedural default and lack of merit. Petitioner has timely objected, triggering the Court's duty to make a de novo determination of issues raised. *See* 28 U.S.C. § 636(b) (1); Fed. R. Civ. P. 72(b).

Petitioner stands convicted of four state law offenses and sentenced to four consecutive terms of imprisonment. He asserts eight grounds for relief, including a claim that his attorney was ineffective for failing to assert the other seven issues properly at trial and on appeal.[1] Judge Couch has examined the merits of all eight claims, including ones as to which respondent raises a defense of procedural bar, to determine that petition has not shown ineffective assistance of counsel, case for procedural default, or entitlement to relief.

Petitioner challenges both the findings of procedural default and the rejection of his other claims. Upon de novo review of issues properly raised, the Court finds Judge Couch's analysis to be correct. Further, as to some claims (particularly grounds six and seven of the petition), petitioner merely refers to prior briefs and says not more than "I object." Such an objection failes to preserve any issue for review. *See United States v. One Parcel of Real Property*, 73 F.3d. 1057, 1060 (10th Cir. 1996).

Therefore, the Court adopts the Report and Recommendation. The petition for writ of habeas corpus under 28 U.S.C. § 2254 is DENIED.

Signed by: Wayne Alley
WAYNE E. ALLEY
United States District Judge

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[1] Despite this assertion, there is no dispute that at least two issues were raised on direct appeal and decided adversely to petitioner. Also, petitioner asserts that other issues were properly raised during his direct appeal by a petition for rehearing.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

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U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY s/bDeputy

HENRY LEE DENNIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CIV-98-335-A
	)	
DAYTON POPPEL, et. al.,	)	
	)	
Respondents	)	DOCKETED

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing with counsel, brings this action pursuant to 28 U.S.C. §2254 seeking a writ of habeas corpus. The Respondent has filed a response to the Petition, to which Petitioner has replied, and the case is now at issue. Pursuant to an order entered by United States District Judge Wayne E. Alley, the matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. §636(b)(l)(B).[1] For

[1] This matter was originally referred to United States Magistrate Judge Doyle W. Argo. By Order of the District Court dated April 7, 1999, the original referral was vacated and the case was referred to this Magistrate Judge.

the reasons set forth herein, it is recommended that the Petition be denied.

By this action, Petitioner challenges his convictions after jury trial in Tillman County District Court, Case No. CF-93-28, for Trafficking in illegal Drugs by Distributing a Quantity of Cocaine Base of 5 Grams or More (Count 1), Trafficking in Illegal Drugs by Possessing or Possessing with Intent to Deliver or Distribute a Quantity of Cocaine Base of 5 Grams or More (Count 2), Distribution of Cocaine Base Without Proper Tax Stamps Affixed (Count 3), and Possession of Cocaine Base Without Proper Tax Stamps Affixed (Count 4), all counts after former felony conviction. Petitioner was sentenced to life imprisonment and a $100,000 fine on Count 1; life imprisonment and a $100,000 fine on Count 2; ten years' imprisonment on Count 3; and ten years' imprisonment Count 4, with all sentences to be served consecutively.

Facts of the Case

On May 19, 1993, members of the Oklahoma Attorney General's Drug Task Force, working with other law enforcement persons, undertook an undercover narcotics investigation with the assistance of a state informant, Charles Shaw. (TR. I, p. 221-222; TR. II, p. 7) Shaw placed a page to Petitioner who was in Vernon, Texas. (TR. II, pp. 12, 82) Petitioner returned the page by placing a phone call to Shaw who was at the police station in Altus, Oklahoma, with members of the investigation team, and Shaw requested that Petitioner meet him in Frederick, Oklahoma (TR. I, pp. 142-143, TR. II, pp. 13-14). The purpose of the meeting was for Shaw to buy crack cocaine from Petitioner. (TR. II, p. 7) Later that same evening, Shaw paged

Petitioner and a meeting was arranged at "Chiefs", a local hangout in Frederick. (TR. I, pp. 143, 146; TR. II, pp. 17-18) During this period of time, Shaw was in the company of Agent David Williams who continued on with Shaw to the arranged meeting place. (TR. I, pp. 146-147; TR. II, p. 18) When Petitioner arrived at Chiefs, Shaw came out and after a brief conversation paid Petitioner approximately $450 for the purchase of rock cocaine. (TR. I, pp. 148-149; TR. II, p. 21) Shaw then returned to the car where Agent David Williams was hiding and handed Williams a piece of rock cocaine weighing approximately 10.0 grams which he had bought from Petitioner. (TR. I, pp. 148-149; TR. II, pp. 22-23) Petitioner drove a couple of blocks from the meeting place and was subsequently stopped by a Detective Carder. (TR. II, pp. 23-24) Carder and Sheriff Hanes handcuffed Petitioner and placed him into custody. (TR. II, pp. 24-25) The car that Petitioner was driving was then searched, and in the floorboard of the car another quantity of rock cocaine weighing approximately 20.7 grams was found. (TR II, pp. 25-26)

Petitioner's Claims

Petitioner raises eight grounds for habeas relief: (1) double jeopardy based on his conviction for two offenses of drug trafficking pursuant to Okla. Stat. tit. 63, §2-4 15 (one offense based on distribution of a controlled dangerous substance and one offense based on possession of a controlled dangerous substance); (2) double jeopardy based on his conviction for two offenses of failure to purchase and affix tax stamps pursuant to Okla. Stat. tit. 68, §450.3 (one offense based on distribution of a controlled dangerous substance without tax stamps and the other offense based on possession of a controlled dangerous

substance without tax stamps); (3) double jeopardy based on his convictions for the separate offenses of drug trafficking and failure to purchase and affix drug tax stamps; (4) violation of due process and equal protection rights due to the alleged vagueness of Okla. Stat. tit. 63, §2-4 *15; (5)* violation of Okla. Stat, tit. 21, § 11, a statutory prohibition against double jeopardy; (6) denial of due process and equal protection rights for alleged failure to apply Okla. Stat. tit. 21, § 11; (7) illegal multiple punishments for offenses that should have merged; and (8) ineffective assistance of trial and appellate counsel.

Of these claims, Petitioner raised only grounds 3 and 4 in his direct appeal. The Oklahoma Court of Criminal Appeals (OCCA), in a summary opinion, rejected these grounds and affirmed the conviction on all counts. The remaining grounds were raised for the first time in Petitioner's application for post-conviction relief. The state district court denied post-conviction relief finding all grounds to be without merit. On appeal, the OCCA barred review of grounds 1 and 4 based on res judicata principles.[2] With respect to Petitioner's grounds 2, 3, 5, 6 and 7, the OCCA determined that Petitioner "failed to set forth and establish sufficient reason why the issues were not raised, or were inadequately raised, in his direct appeal." See OCCA Order Affirming Denial of Post-Conviction Relief at 4. Thus, it appears the OCCA deemed these claims to be

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[2] A review of Petitioner's Brief in Chief filed on direct appeal establishes that ground 1 was not raised in the direct appeal and therefore, the OCCA's determination that review of that claim was barred by res judicata was in error. Respondent duly notes the error. See Response to Petition for Writ of Habeas Corpus at 19. Ground 3, not ground 1 was raised by Petitioner in his direct appeal.

procedurally defaulted. The OCCA rejected Petitioner's ineffective assistance of counsel claim (ground eight) on the merits. The ineffective assistance of counsel claim was based on counsel's failure to raise at trial and on direct appeal the seven other claims raised by Petitioner in the instant Petition.

Analysis

Procedural Default

As to Petitioner's grounds 2, 5, 6 and 7, Respondent has raised the defense of procedural default.[3] On habeas review, a federal court does not address issues that have been defaulted in state court on an independent and adequate state procedural ground unless the petitioner can demonstrate cause for the default and actual prejudice as a

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[3] In his traverse/reply, Petitioner claims that grounds 2,5,6 and 7 were raised in his Petition for Rehearing submitted to the OCCA upon affirmance of Petitioner's conviction in his direct appeal. Therefore, Petitioner argues that these grounds are not procedurally defaulted. The record does not support Petitioner's argument. Review of the Petition for Rehearing establishes that only two issues relating to multiple punishments were raised " whether the conviction for trafficking in cocaine was subsumed by the conviction for failure to affix tax stamps and, as part of that argument, whether it was "impermissible to charge the no tax stamp as two (2) offenses." See Petition for Rehearing at 2. Furthermore, under Oklahoma law, a party cannot raise for the first time in a petition for rehearing an issue not raised on direct appeal. See Duvall v. State, 825 P.2d 621, 637 (Okla.Cr.App. 1991) (noting that the rules of the OCCA do not allow raising a new proposition of error through a petition for rehearing). As set forth herein, however, because Petitioner has raised an ineffective assistance of counsel claim as to these claims, the Court will review their merits.

result of the alleged violation of federal law or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 749-50 (1991); Steele v. Young, 11 F.3d 1518, 1521 (10th Cir. 1993).[4] A state procedural ground is "independent" if it relies on state law, rather than federal law, as the basis for the decision. Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985); Klein v. Neil, 45 F.3d 1395, 1398-99 (10th Cir. 1995). The state procedural ground is "adequate" if it is applied evenhandedly in the vast majority of cases. Maes v. Thomas, 46 F.3d 979,985-86(10th Cir.), cert. denied. 514 U.S. 1115 (1995).

Under Oklahoma law, "post-conviction relief is reserved only for the rare set of circumstances where a particular claim 'could not have been raised on direct appeal."' Brecheen v. Reynolds, 41 F.3d 1343, 1349 n. 4(10th Cir. 1994), cert. denied. 515 U.S. 1135 (1995). This rule is generally an independent and adequate state ground for refusing to review claims not raised on direct appeal. Id. at 1356; Odum v. Boone. 62 F.3d 327, 331 (10th Cir. 1995). However, a claim of ineffective assistance of counsel may constitute "cause" for a procedural default requiring a court to consider the claim on federal habeas review. See Coleman v. Thompson, 501 U.S. 722, 753-54 (1991).

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[4] A fundamental miscarriage of justice requires a showing of factual innocence. See Steele 11 F.3d at 1522; United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993). Petitioner has not alleged factual innocence. Therefore, the Court limits its review of the procedural default defense to an analysis of cause and prejudice.

Ineffective Assistance of Counsel -- (Ground Eight)

In ground eight of his Petition, Petitioner claims that he was denied effective assistance of counsel at trial and on appeal to his prejudice "which denied him his constitutional right to a first appeal as of right-- requiring reversal." See Brief of Petitioner at 19. Petitioner submits this claim as to all other seven grounds for relief raised in his Petition, including those which Respondent claims are procedurally defaulted.[5]

Petitioner's federal habeas Petition was filed on March 5, 1998. Therefore, review of his ineffective assistance of counsel claim is governed by 28 U.S.C. §2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996. See Lindh v. Murphy, 521 U.S. 320 (1997); Fleming v. Hargett, No. 98-6059, 1998 WL 427140 (10th Cit., July 14, 1998)[6] Petitioner is not entitled to habeas

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[5] Petitioner did not raise the claim of ineffective assistance of counsel on direct appeal. However, because the same counsel represented Petitioner at both the trial and appellate level, this claim is not procedurally defaulted. See English v. Cody, 146 F.3d 1257, 1264 (10th Cir. 1998) (Oklahoma procedural bar will preclude federal habeas review of ineffective assistance of counsel claim only in limited cases where trial and appellate counsel differ and the ineffectiveness claim can be resolved upon the trial record alone). Moreover, because the OCCA denied Petitioner's claim of ineffective assistance of counsel on its merits, the claim is not procedurally defaulted and must be reviewed. See Ylst v. Nunnemaker, 501 U.S. 797, 800 (1991) ("[I] f the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review that might otherwise have been available."); Harris v. Reed, 489 U.S. 255, 262 (1989) (claims not treated as waived by state courts must be considered on the merits). Respondent does not assert a procedural default with respect to Petitioner's ineffective assistance of counsel claim.

relief unless the state court's adjudication of this claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(l).

To establish "cause" sufficient to overcome a procedural default based on ineffective assistance of counsel, Petitioner must satisfy both prongs of the test established in Strickland v. Washington, 466 U.S. 668 (1984); that is, he must show (1) that his attorney's representation fell below an objective standard of reasonably competent assistance; and (2) that there is a reasonable probability that the result of the trial or appeal would have been different but for the attorney's deficient performance, i.e. Petitioner must show prejudice as a result of the deficient performance. Strickland. 466 U.S. at 688, 694.

In denying Petitioner's ineffective assistance of counsel claim on the merits, the state district court determined that because "all of the issues raised by [Petitioner] as evidence of the ineffectiveness of counsel have been found to be without merit . . . [t]here is no showing that [Petitioner] was denied effective assistance of counsel." See District Court Order at Paragraph 8. The OCCA affirmed the district court's finding that Petitioner had not established his counsel's ineffectiveness and applied the standards set forth by the Supreme Court in Strickland. The OCCA concluded that: "Petitioner has not established that any issue raised in this post-conviction proceeding was or is a 'dead bang

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[6] This unpublished decision is cited for its persuasive value in accordance with 10th Cir. R.36.3 (B).

winner,' warranting this Court's further consideration that his trial/appellate counsel was so ineffective that the proceedings against him were rendered fundamentally unfair." See OCCA Order Affirming Denial of Post-Conviction Relief at 6.

The Court will examine the merits of all grounds raised by Petitioner, including grounds 2, 5, 6 and 7 which Respondent asserts are procedurally barred, to determine whether Petitioner has been prejudiced by his trial/appellate counsel's alleged deficient performance. Because, as set forth in the analysis below, the Court finds all seven grounds to be without merit, Petitioner cannot establish prejudice and his claim of ineffective assistance of counsel necessarily fails.[7]

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[7]The failure of Petitioner to establish prejudice makes it unnecessary to determine whether counsel's performance was deficient. See Brewer v. Reynolds, 51 F.3d 1519, 1523, n. 7 (10th Cir. 1995) (noting that because court would dispose of ineffective assistance of counsel claim due to lack of prejudice, court did not need to analyze whether counsel's performance was deficient), cert. denied, 516 U.S. 1123 (1996). Moreover, the Court need not separately address the merits of Petitioner's claim of ineffective assistance of counsel. See United States v. Easter, No. 97-6137, 1998 WL 33894 (10th Cir. Jan. 29, 1998) (where stand-alone claims are raised as part of ineffective assistance of counsel claim and stand-alone claims fail on the merits precluding a finding of prejudice, court need not separately address claim of ineffective assistance of counsel) citing Strickland v. Washington, 466 U.S. 668, 697 (1984); Ross v. Ward 165 F.3d 793, 798 (10th Cir. 1999) (court need not analyze ineffective assistance of counsel claim for purposes of determining cause for a procedural default where petitioner was unable to show prejudice).

Double Jeopardy – Trafficking Convictions (Ground One)

In his first proposition, Petitioner challenges his two convictions of "trafficking" under Okla. Stat. tit. 63, §2-415 as violative of the Fifth Amendment Double Jeopardy Clause.[8] Respondent, citing Blockburger v. United States, 284 U.S. 299 (1932), contends that there is no violation of double jeopardy because the two trafficking counts are based on two separate criminal transactions: first, the sale of rock cocaine to an informant [TR. II, pp. 2 1-23]; and second, the possession of another quantum of rock cocaine found upon the subsequent arrest of Petitioner [TR. II, pp. 24-25]. Petitioner recognizes that trafficking under §2-415 can be committed by four different methods, but maintains that only one conviction can result. Petitioner therefore claims that he was found to have used two methods, simultaneously, to commit only one statutory offense.

The Double Jeopardy Clause consists of three separate constitutional protections. "It protects against a second prosecution for the same offense after acquittal. It protects

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[8] Petitioner did not raise this claim on direct appeal, but raised the issue for the first time when seeking post-conviction relief The OCCA, in affirming the denial of post-conviction relief, held this claim was barred by res judicata finding that this issue had essentially been raised in proposition one of Petitioner's direct appeal. See OCCA Order Affirming Denial of Post-Conviction Relief at 4. As Respondent correctly notes, however, a review of the record shows that the claim raised in Petitioner's direct appeal was the claim raised in ground three of Petitioner's instant Petition. Respondent does not contend that ground three is procedurally barred but instead argues the claim, though exhausted, is merit less.

against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794 (1989). At issue here is the third protection. This third protection is limited to ensuring that "the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Brown v. Ohio, 432 U.S. 161, 165 (1977) (citations omitted). Upon review of habeas claims based on multiple punishment, this Court determines only whether the sentencing court has imposed greater punishment than the legislature intended. Missouri. Hunter, 459 U.S. 359, 365 (1983). If the legislature intended to punish the conduct as two separate offenses, then conviction for both offenses is not prohibited provided the conduct is prosecuted in the same proceeding. See, Department of Revenue of Montana v. Kurth Ranch 511 U.S. 767, 778 (1994). The essential question raised by Petitioner's double jeopardy claim, therefore, is one of statutory construction, i.e., whether the Oklahoma legislature intended that each violation of Okla. Stat. cit. 63, §2-415(B) be a separate offense. See Ohio v. Johnson, 467 U.S. 493, 499 (1984); Missouri v. Hunter, 459 U.S. at 366.

In determining whether a state legislature intended to prescribe cumulative punishments for a single criminal incident, this Court is "bound by a state court's determination of the legislature's intent." Cummings v. Evans, 161 F.3d 610, 615 (10th Cir. 1998), cert. denied, ____ U.S. ____, 119 S.Ct. 1360 (1999), quoting Birr v. Shillinger, 894 F.2d 1160, 1161 (10th Cir.), cert. denied 496 U.S. 940 (1990). Whether the Oklahoma legislature intended for multiple punishments to be imposed pursuant

to Okla. Stat. cit. 63, §2-415(B)(1)[9] is an issue not previously addressed by the Oklahoma courts. The Oklahoma courts have, however, addressed the issue of multiple punishments in construing Okla. Stat. tit. 63, §2-401(A)(1), and a statute, as pointed out by Petitioner that is similar to the statute at issue.[10]

Petitioner relies on Watkins v. State. 855 P.2d 141 (Okla. Cr. App. 1992), a case finding a double jeopardy violation in relation to Okla. Stat. tit. 63, §2-401(A)(l). The state district court, in denying post-conviction relief, ruled that Watkins did not apply to the facts of Petitioner's case. See District Court Order at 1.

In Watkins, the appellant had been arrested "for causing a single package containing two types of controlled substances to be shipped from Oklahoma to California." The OCCA applied the "same evidence test" and found

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[9] Section 2-415(B)(1) provides:

> **1. Knowingly distribute, manufacture, bring into this state or possess a** controlled substance specified in subsection A of this section in the quantities specified in subsection C of this section.
>
> Okla. Stat tit. 63, §2-415(B)(1).

[10] Section 2-401(A)(1) provides:

> Except as authorized by the Uniform Controlled Dangerous Substances Act, Section 2-101 et seq. of this title, it shall be unlawful for any person:
>
> 1. To distribute [or] dispense . . . a controlled dangerous substance or possess with intent to manufacture, distribute, or dispense, a controlled dangerous substance.
>
> Okla. Stat. tit. 63, §2-401(A)(1) (Supp. 1993).

double jeopardy violated because the appellant had been charged with multiple counts of possession and conspiracy for each of the types of drugs found in the single package and the elements of each count were the same. The charges arose under Okla. Stat. tit. 63, §2-401 for possession with intent to distribute "a controlled dangerous substance". The OCCA found liability could exist for only one count of possession and one count of conspiracy because the statutory prohibition in §2-401 did not distinguish between types or classifications of drugs.[11]

In Petitioner's case, however, the issue is whether two separate acts identified in a single statutory provision (distribution and possession) can give rise to multiple offenses, making this case more factually analogous to Ferguson v. State, 644 P.2d 121) Okla. Cr. App. 1982). In Ferguson another case involving a violation of §2-401, the appellant claimed a violation of double jeopardy where he previously had been convicted of possession of marijuana with intent to distribute and thereafter, in a separate proceeding, was convicted of unlawful delivery of marijuana. The OCCA, applying the Blockburger same evidence test, rejected appellant's double jeopardy claim based on the finding that "different caches of marijuana" supported each of the convictions. Id. at 122. Appellant's possession charge was based on marijuana in his possession after having made a sale, while the unlawful delivery

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[11] In contrast to §2-401 at issue in Watkins the prohibition of §2-415 does distinguish between types or classification of drugs. Subsection A of §2-415 identifies seven particular substances to which the Act applies, and Subsection C of §2-415 establishes distinct punishments for violations involving specified quantities of each substance. See also footnote 9, supra.

charge was based on marijuana appellant had previously sold to an informant. Id. See also Warthen v. State 559 P.2d 483,484-85 (Okla. Cr. App. 1977) (finding no violation of double jeopardy for convictions of unlawful delivery and possession with intent to distribute under §2-401 where offenses arose on same night but charge of intent to distribute was not based upon marijuana bought and removed by agent but instead on marijuana subsequently found in the possession of the defendant); Howell v. Scott, No. 96-6 183, 1996 WL 705203 (10th Cir., Dec. 9, 1996) (rejecting as "ludicrous" petitioner's claim that "multiple punishments for charges of possession of LSD, marijuana and cocaine constitute double jeopardy under Oklahoma and federal law because they all arose from a single incident involving the 'single criminal act' of possessing drugs").[12]

The evidence of record establishes that Petitioner distributed one quantum of rock cocaine to an informant and possessed a distinct quantum of rock cocaine which he retained and which was seized after the completion of the sale to the informant upon Petitioner's subsequent arrest. Under Oklahoma law, the completed distribution of a quantity of drugs is a criminal act that is separate and distinct from the possession of additional drugs intended for future sale. The trafficking crimes for which Petitioner was convicted, therefore, were separate and distinct and not, as asserted by Petitioner, simultaneous methods for committing a single statutory offense. Petitioner's Fifth Amendment double jeopardy claim relating to his two convictions of drug trafficking for offenses committed in

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[12] This unpublished decision is cited for its persuasive value in accordance with 10th Cir. R.36.3(B).

violation of Okla. Stat. tit. 63, §2-415 is rejected. The separate clauses of §2-415 allow for conviction of two different offenses, possession with intent to distribute and distribution where, as here, the evidence indicates separate quantities of drugs underlie the two offenses charged.[13]

Double Jeopardy -- Tax Stamps Convictions (Ground Two)

In ground two, Petitioner challenges, as a violation of double jeopardy, his convictions for two offenses of "distribution and possession of controlled dangerous substance without purchasing and affixing tax stamp" (Petitioner's Brief at *5)* in violation of the Controlled Dangerous Substance Tax Act, Okla. Stat. tit. 68, § *§450.1* - 450.9 (the "Tax Act"). This issue was not raised on direct appeal but instead was raised for the first time in Petitioner's application for post-conviction relief. The state district court, in rejecting this argument, found that "there

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[13] The Court finds further support for this result in case authority construing a federal drug statute, 21 U.S.C. §841(a), which contains provisions analogous to §2-415. Claims of double jeopardy based on a conviction of two or more offenses under §841(a) have consistently been rejected where, as here, separate and distinct quantities of drugs underlie the two offenses charged. See, United States v. Johnson, 977 F.2d 1360, 1374 (10th Cir. 1992) (various stashes of a drug give rise to separate offenses where the evidence indicates they were intended for different purposes or transactions and under such circumstances, a conviction under §841(a) of both possession and possession with intent to distribute does not violate double jeopardy), Behrens v. United States, 506 U.S. 1070 (1993); United States v. Randall, 1999 WL 183781 (4th Cir. April 5, 1999) (separate clauses within §841(a) for possession with intent to distribute and distribution are two different offenses and conviction for both offenses does not violate double jeopardy).

were two separate and distinct instances of 'distribution and/or possession of controlled dangerous substance without purchasing and affixing tax stamps"' and therefore Petitioner was not subjected to double jeopardy. See District Court Order at 1.

In the present Petition, Petitioner claims that he possessed "the entire 30.7 grains" of cocaine base, which resulted in his conviction without the requisite tax stamps and therefore could be found guilty of only one offense under the Tax Act. Petitioner's two convictions under the Tax Act, however, were based on evidence that Petitioner had distributed approximately 10.0 grains of cocaine base without the proper tax stamp affixed and possessed approximately 20.7 grains of cocaine base without the proper tax stamp affixed.

A plain reading of Section 450.8(B) of the Tax Act demonstrates that a violation occurs whenever a dealer distributes a controlled dangerous substance without affixing the appropriate stamp and whenever a dealer possesses a controlled dangerous without affixing the appropriate stamp:

> Any dealer manufacturing, distributing, producing, shipping, transporting, importing or possessing any controlled dangerous substance without affixing the appropriate stamp, upon conviction, is guilty of a felony.

Okla. Stat. tit. 68, §450.8(B) (emphasis added). The statutory language creates a separate offense for failure to affix the requisite tax stamp with regard to each act identified therein. The legislative intent is clear that

punishment for both offenses is authorized. See Hunter, supra, 459 U.S. at 365. The Court finds, therefore, that no double jeopardy violation attaches to Petitioner's conviction for separate offenses of distribution of cocaine base without proper tax stamps affixed and possession of cocaine base without proper tax stamps affixed.

Double Jeopardy -- Trafficking Convictions Subsumed by Tax Stamp Conviction (Ground Three)

In ground three, Petitioner claims a violation of double jeopardy contending that his trafficking convictions pursuant to Okla. Stat. tit. 63, §2-415 were "totally subsumed" by his tax stamp convictions pursuant to Okla. Stat. tit. 68, §450.1. Both Petitioner and Respondent cite to Blockburger v. United States 284 U.S. 299 (1932), in support of their respective positions on this issue focusing on whether the tax stamp convictions required proof of an element not required for the trafficking convictions. The Court finds, however, that Missouri v. Hunter, 459 U.S. 359 (1983), controls the issue.

In Hunter, the Court explained the Blockburger test to be a rule of statutory construction intended to prevent double punishment in a situation where the legislature has in fact intended to provide a single punishment for the offense:

> [S]imply because two criminal statutes may be construed to proscribe the same conduct under the Blockburger test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. .

> Where, as here, a legislature specifically authorizes cumulative punishments under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under Blockburger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Hunter, 459 U.S. at 368-69.

Again, the question before this Court is one of legislative intent: whether the Oklahoma legislature intended that a person be convicted for both trafficking under Okla. Stat. tit. 63, §2-415 and failing to affix tax stamps under the Tax Act. This Court defers to the OCCA's interpretation of state law in assessing whether the legislature intended cumulative punishments. Cummings, supra, 161 F.3d at 614; Mansfield v. Champion, 992 F.2d 1098, 1100 (10th Cit. 1993).

The OCCA rejected this very argument made by Petitioner in White v. State, 900 P.2d 982 (Okla. Crim. App. 1995). In that case, White, like Petitioner, was convicted of both trafficking in violation of Okla. Stat, tit. 63, §2-4 15 and unlawful possession of a controlled dangerous substance without a tax stamp in violation of Okla. Stat. tit. 68, §450.1. White did not raise a double jeopardy claim until his petition for rehearing, relying upon Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994), which had been decided during the pendency of his appeal. In that case, the Supreme Court

found that a Montana drug tax violated double jeopardy because it allowed the commencement of tax collection proceedings the taxpayer had already been convicted of the drug offense. The Supreme Court expressly noted, however, that imposing the drug tax in the same proceeding as the prosecution for the drug offense would be permissible. Id. at 783.

In denying White's petition for rehearing, the OCCA found that "where a defendant is punished for both failure to pay a drug tax and committing a drug offense, all in the same proceeding, no double jeopardy problem exists." Id. at 996. The OCCA, therefore, has rejected a double jeopardy challenge to convictions of trafficking and failure to affix a tax stamp, a conclusion that is consistent with Kurth Ranch.

Moreover, the statutory language of the Tax Act makes clear that the Oklahoma legislature intended punishment hereunder to be in addition to other statutory offenses. Section 450.1(2) of the Tax Act defines "dealer" as a person who "in violation of the Uniform Controlled Dangerous Substances Act[14] manufactures, distributes, produces, ships, transports, or imports into Oklahoma or in any manner acquires or possesses ... seven or more grams of any controlled dangerous substance..." (Emphasis added.) This statutory language makes clear that when the legislature created additional penalties for the crime of failure to affix a drug tax stamp, the legislature recognized that the drug tax stamp requirement would apply against one who was also in violation of a separate criminal law. See State v. Detweiler, 544 N.W.2d 83, 91 (Neb. 1996)

[14] See Okla. Stat. tit. 63, §§2-101 et seq.

(examining similar Nebraska drug tax stamp and holding that legislature intended to punish both for failure to affix a drug tax stamp and possession with intent to deliver and finding no double jeopardy violation).

Further confirmation that punishment for violation of the Tax Act was intended to be in addition to other punishments is found in §450.8 (C) which provides: "Nothing in this Act may in any manner provide immunity for a dealer from criminal prosecution pursuant to Oklahoma law." See Okla. Stat. tit. 68, §450.8(C). This section recognizes that compliance with the tax stamp requirements does not insulate a dealer who possesses or distributes a taxable substance like cocaine base from prosecution or conviction under Oklahoma law. See State v. Gallup, 500 N.W.2d 437,443 (Iowa 1993) (affirming conviction of delivery of controlled substance and distribution of taxable substance without drug tax stamp where legislative intent established cumulative punishment under two statutes was authorized regardless of whether those statutes proscribed the same conduct under application of a Blockburger test).[15]

Based on both the OCCA's pronouncements in White and the legislative intent as ascertained from the statutory language of the Tax Act, punishment for both trafficking and failure to affix a tax stamp is authorized under Oklahoma law. Because the Oklahoma legislature has demonstrated intent to permit cumulative punishments, the double jeopardy clause is not violated. See, Ohio v.

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[15] "The Iowa statutory provisions at issue in Gallup are virtually identical to the provisions in the Oklahoma Tax Act.

Johnson, 467 U.S. at 499. Accordingly, Petitioner is not entitled to relief on this claim.

Vagueness of Okla. Stat. tit. 63, §2-415 -- (Ground Four)

Ground Four of the Petition challenges the conviction for the trafficking offenses pursuant to Okla. Stat. tit. 63, §2-415 on the ground that the statutory provisions are unconstitutionally vague and thereby violate Petitioner's due process and equal protection rights. Petitioner raised this issue both in his direct appeal and in seeking post-conviction relief. The OCCA, in affirming the conviction on direct appeal found this issue to be without merit and on appeal from denial of post-conviction relief found the issue to be barred by res judicata.

A criminal statute will not be found void for vagueness unless it fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352, 357 (1983). Petitioner takes issue with the "separate, distinct, and unequal punishments for Trafficking in 'Cocaine' as opposed to 'Cocaine Base"' (Petitioner's Brief at 9) claiming that the statute fails to provide "any definitional or explanatory chemical, biological or commonly understood distinction between them." Id. Petitioner does not contend that what he possessed was not in fact rock cocaine, nor does he present any evidence to support such a conclusion. Rather, Petitioner claims he has been denied due process and equal protection because the sentence he received might have

been less if he had been charged with trafficking in cocaine rather than cocaine base.[16]

Petitioner's argument has been rejected by the Tenth Circuit in construing a federal statute similar to §2-415,[17] which provides for "unequal punishments" for offenses involving cocaine and cocaine base. See United States v. Easter, 981 F.2d 1549, 1557-58 (10th Cir. 1992) (21 U.S.C. §841(b) is not constitutionally void for vagueness because statute makes clear that "trafficking in cocaine, no matter what the form, will result in punishment" and "[t]herefore, an ordinary person is on notice that trafficking in a form of cocaine, such as cocaine base, is prohibited conduct"), cert. denied 508 U.S. 953 (1993); United States v. Turner, 928 F.2d 956, 959 (10th Cir. 1991) ("different penalties [under 21 U.S.C. §841(b)] for cocaine base and cocaine in its other forms do not violate due process"), cert. denied, 502 U.S. 881 (1991).[18] Because Petitioner does not dispute that the

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[16] Trafficking in cocaine requires a minimum of 28 grams of the controlled dangerous substance while trafficking in cocaine base requires a minimum of 7 grams of the controlled dangerous substance. See Okla. Stat. tit. 63, §2-415(C)(2)(a) and (7)(a). Petitioner's two trafficking convictions were based on possession of 10.0 and 20.7 grams of cocaine base, respectively.

[17] See 21 U.S.C. § 841(b)(1).

[18] Petitioner cites United States v. Davis, 864 F. Supp 1303 (N.D. Ga. 1994) in support of his vagueness challenge to §2-415. As Easter and Turner establish, however, the Tenth Circuit has rejected challenges to the one accepted by the court in Davis. Several other courts have also rejected the district court's analysis in Davis See United States v. Lightner, Nos. 94-5540, 94-554 1, 1996 WL 295284 (4th Cir. June 5, 1996), cert. Denied, 519 U.S. 940 (1996); United States v. Jackson, 84F.3d 1154 (9th Cir. 1996), cert. Denied 519 U.S. 986(1996); United Statesv. Rentena No. 94-5847, 1996 WL 279006 (4th Cir. May 28, 1996); United States v. Crawford, 83 F.3d 964 (8th Cir.

substance he possessed was a form of cocaine, §2-415 is not unconstitutionally vague as applied to the facts of this case as Petitioner was sufficiently on notice that he was engaged in prohibited conduct. Ground four, therefore, is without merit.

Double Jeopardy -- Okla. Stat. tit. 21. §11 (Ground Five)

Petitioner, in ground five, cites Okla. Stat. tit. 21, § 11, a statutory double jeopardy provision, as grounds for dismissing three of his convictions. This issue was first raised in Petitioner's application for post-conviction relief. The state district court rejected the claim, finding that Petitioner "was convicted of two separate counts of trafficking and of two separate counts of failure to affix tax stamps...separate and distinct offenses, consisting of different elements of dissimilar proof." See District Court Order at 2.

Section 11 provides:

> an act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, ... but in no case can [it] be punished under more than one; and an

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1996), cert. Denied 519 U.S. 903 (1996); United States v. Smith, 73 F.3d 1414 (6th Cir. 1996); United Statesv. Booker, 70 F.3d 488, 489-91 (7th Cir. 1995), cert. Denied 517 U.S. 1111 (1996); United States v. Hatchett, 68 F.3d 477 (7th Cir. 1995), . denied, 516 U.S. 1151 (1996); United States v. Fisher, 58 F.3d 96, 99 (4th Cir.), cert. Denied, 516 U.S. 927 (1995); United States v. Buchanon 909 F.Supp. 99, 101 (N.D.N.Y. 1995).

> acquittal or conviction and sentence under either one, bars the prosecution for the same act or omission under any other.

Okla. Stat. tit. 21, § 11(1991). This statutory provision, which is separate from the double jeopardy provisions of the Oklahoma state constitution, has been found to be indicative of the Oklahoma legislature's intent that a defendant be punished only once for a single act even though that act or omission is punishable under different statutes. See Hale v. State, 888 P.2d 1027, 1030 (Okla. Crim. App. 1995). Application of§11 is a question of state law not subject to review on federal habeas. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). This Court considers the provision, therefore, only for purposes of ascertaining legislative intent in relation to determining whether a federal double jeopardy violation has occurred. See Cummings v. Evans, 161 F.3d 610, 614 (10th Cir. 1998).

The OCCA, interpreting Section 11, has declared that if a single criminal act gives rise to offenses which are not separate and distinct, but rather are (1) mere means to some other ultimate objective, (2) lesser included offenses; or (3) merely different incidents or facets of some other offense, that conduct may not be punished under more than one statute. Hale, 888 P.2d at 1029. Under §11, the proper analysis is:

> neither whether the offenses arise from the same conduct nor whether they must be proved by the same evidence, but whether, taken as a whole, a defendant has been punished twice for one criminal course of

> conduct where his offenses were incident to one objective.

Id. (emphasis added).

The OCCA has held that the completion of one separate and distinct offense does not prevent the defendant from being punished for a later offense committed within the same criminal episode if the two offenses did not assist each other, i.e., neither is a means to the other. Section 11 does not apply under those circumstances because the defendant has manifested two separate criminal objectives. Cummings, 161 F.3d at 615 citing Ashinsky v. State, 780 P.2d 201, 208 (Okla. Crim. App. 1989).

The Oklahoma courts have yet to apply § 11 to offenses under Okla. Stat. tit. 63, §2-415. In Mathues v. State, 925 P.2d 64 (Okla. Cr. App. 1996), however, the OCCA relied on § 11 in finding a double jeopardy violation for multiple convictions arising out of offenses under Olda. Stat. tit. 63, §2-40 1, which, as previously noted, is a statutory provision similar to §2-415. The appellant in that case was charged with two separate crimes, delivery of cocaine and receiving or acquiring proceeds derived from that delivery. The separate crimes for which appellant was convicted arose out of the singular act of selling a single rock of cocaine. Id. at 65. The OCCA found appellant had been punished twice for one criminal act because "both charged offenses were incident to one objective." Id. This is not a case like Mathues, however, where the two convictions for possession and distribution were based on a single act of selling singular quantum of rock cocaine. Rather, here, the record clearly establishes two criminal acts that were not incident to one objective. Upon completion of the sale of

rock cocaine to Shaw, Petitioner retained in his possession an additional quantum of rock cocaine. Petitioner has not, therefore, been subjected to double jeopardy prohibited under the provisions of § 11.

In ground six of his Petition, Petitioner raises a due process/equal protection claim based on an alleged failure of the state courts to apply Okla. Stat, tit. 21, § 11. Petitioner asserts that failure to apply § 11 resulted in a conviction for multiple offenses that should have been deemed a singular offense and therefore his punishment has been increased. According to Petitioner, the state courts' failure to apply § 11 results in a judicial ex post facto decision in violation of his constitutional rights to due process and equal protection.

Petitioner did not raise this issue until seeking post-conviction relief. In denying that relief, the district court rejected this claim citing Ashinsky v. State, 780 P.2d 201 (Okla. Cr. App. 1989). In Ashinsky, the OCCA cited to Okia. Stat. tit. 21, § 11 in determining a double jeopardy issue. Thus, it appears that § 11 was properly considered and determined by the state district court to be inapplicable. Because § 11 is purely a matter of state law, this Court is bound by the determination of the district court with respect to this issue. Ohio v. Johnson, 467 U.S. 493, 499 (1984) (when reviewing a state legislature's intention regarding cumulative punishments for a single incident, this Court is bound by the state court's determination of the legislature's intent); Lucero v. Kerby, 133 F.3d 1299, 1316 (10th Cir.), cert. denied, 118 S.Ct. 1684 (1998) (in habeas review, federal court defers to state court's interpretation of statutory provisions to determine separate offenses for double jeopardy purposes). Petitioner has failed to show

that his constitutional rights have been violated as a result of § 11. Moreover, the Court has determined herein that under both the Fifth Amendment and the legislative intent as expressed in § 11, Petitioner has not been subjected to double jeopardy. No judicial ex post facto decision has occurred and no increased punishment has been imposed on Petitioner. Accordingly, ground six is without merit.

Merger of Offenses (Ground Seven)

In ground seven, Petitioner alleges that under the doctrine of merger of offenses his convictions violate constitutional double jeopardy. The Court has found each of Petitioner's double jeopardy claims to be without merit and therefore rejects Petitioner's contention that his offenses should merge. Unlike Williams v. State, 807 P.2d 271 (Okla. Grim. App. 1991), relied upon by Petitioner, which involved merger of a felony charge with a murder charge in a felony-murder conviction, here each of the charges against Petitioner involve a separate and distinct offense. See Doyle v. State, 785 P.2d 317, 325-26 (Okla. Crim. App. 1989) (rejecting appellant's contention that sentences should run concurrently since offenses were committed during single episode and finding no abuse of discretion in running sentences consecutively where each offense committed consisted of "separate and distinct elements, none of which merged into proof of any of the others").

Petitioner further submits that at a minimum, pursuant to Okla. Stat. tit. 22, § 976, his sentences should have run concurrently, rather than consecutively. Therefore, the only issue raised by ground seven is whether the provisions of

Okla. Stat. tit. 22, §976 have been properly applied.[19] This is purely an issue of state law, not cognizable on federal habeas review. See Walker v. Champion, No. 97-6402, 1998 WL 712588 at *1 (10th Cir. Oct. 13, 1998) (on habeas review, court "affords wide discretion to state trial court's sentencing decision, and challenges to that decision are not generally constitutionally cognizable, unless it is shown the sentence imposed is outside the statutory limits or unauthorized by law"); Ellifrits v. Davies No. 91-3252, 1992 WL 43494 (10th Cir, March 2, 1992) (habeas petitioner's challenge to consecutive sentences as abuse of state trial court's discretion presented claim of state law not cognizable on federal habeas review).[20] Petitioner's sentences appear to be in conformity with state law. The record establishes that Petitioner had been convicted of a prior felony of possession with intent to distribute a controlled dangerous substance, marijuana. (TR II, p. 89) Therefore, his sentences for the two trafficking charges at issue here were governed by Okla. Stat. tit. 63, §2-415(D)(2). The sentences he received are within the statutory range of permissible punishment. Likewise, the

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[19] Section 976 provides:

> If the defendant has been convicted of two or more offenses, before judgment on either, the judgment may be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of the offenses. Provided, that the sentencing judge shall, at all times, have the discretion to enter a sentence concurrent with any other sentence.

Okla. Stat. tit. 22, §976 (1991).

[20] These unpublished decisions are cited for their persuasive value in accordance with 10th Cir. R. 36.3(B).

sentences Petitioner received for the two violations of the Tax Act governed by Okla. Stat. tit. 68, §450.8 and Okla. Stat. tit. 21, §51 are within the statutory range. [21] The sentence Petitioner received for each of his convictions was thus within the statutory range of permissible punishment.

The arguments asserted in ground seven, like the other grounds presented by Petitioner, are without merit. They fail to establish the prejudice required for an ineffective assistance of counsel claim and they fail independently to provide a basis for relief in this habeas proceeding.

RECOMMENDATION

For these reasons, it is recommended that the petition for a writ of habeas corpus be denied. Petitioner is advised of his right to file an objection to this Report and Recommendation with the Clerk of the District Court by June 22, 1999, in accordance with 28 U.S.C. §636 and Local Civil Rule 72.1. The Petitioner is further advised that failure to make timely objection to this Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. Moore v. United States, 950 F.2d 656 (10th Cit. 1991). This Report and Recommendation disposes of all issues referred to this Magistrate Judge in the captioned matter.

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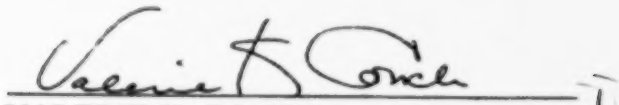
[21] Section 450.8 sets forth the punishment to be "imprisonment in the State Penitentiary for not more than five *(5)* years. . . ." Because Petitioner had been convicted of a prior felony, Okla. Stat. tit. 21, *§51* applies and provides for "a term not exceeding ten (10) years."

ENTERED this 7th day of June, 1999.



VALERIE K. COUCH
UNITED STATES
MAGISTRATE JUDGE